

# EXHIBIT A

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEW JERSEY  
3 CIVIL ACTION NO. 06-cv-1625-SRC-CCC

4 BIOVAIL CORPORATION, BIOVAIL  
5 PHARMACEUTICALS, INC.,

6 Plaintiffs

7 vs.

8 S.A.C CAPITAL MANAGEMENT, LLC,  
9 et als,

10 Defendants.

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11 January 9, 2007  
12 Newark, New Jersey

13  
14 B E F O R E: HONORABLE STANLEY R. CHESLER, USDJ

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16 Pursuant to Section 753 Title 28 United States Code, the  
17 following transcript is certified to be an accurate record as  
18 taken stenographically in the above-entitled proceedings.

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20 Official Court Reporter

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1           THE COURT: All right. This is Biovail vs. S.A.C.  
2 Capital Management. Can I have appearances by counsel  
3 please.

4           MR. KASOWITZ: Marc Kasowitz, Kasowitz, Benson,  
5 Torres & Friedman, for plaintiffs, your Honor. This is  
6 Michael Bowe of Kasowitz, Benson, Torres & Friedman, also for  
7 plaintiff and Bruce Nagel, Nagel & Rice, also for plaintiffs,  
8 your Honor.

9           MR. KRAMER: Good morning. Dan Kramer from Paul  
10 Weiss for the S.A.C. defendants. I have Andrew Gordon from  
11 my firm with me this morning, as well as Deborah Silodor from  
12 Lowenstein, Sandler and Marty Klotz from Willkie Farr &  
13 Gallagher.

14          THE COURT: Good morning to all of you. All right.  
15 Who's going to be arguing on behalf of plaintiffs?

16          MR. KASOWITZ: I will, your Honor.

17          THE COURT: All right, Mr. Kasowitz. Go ahead.

18          MR. KASOWITZ: Thank you, your Honor. I think that  
19 from our point of view, the simple fact here is that this  
20 Court lacks subject matter jurisdiction over this case. The  
21 case is a state law RICO claim brought by a pharmaceutical  
22 company against a group of hedge funds and securities  
23 analysts who the complaint alleges have attacked the company  
24 and sought to destroy it through a campaign of disinformation  
25 and harassment.

1           There are no federal causes of action alleged in the  
2       complaint and the alleged predicate acts upon which the state  
3       RICO claim is based which are -- which include both state law  
4       and federal law, predicate acts, don't implicate any statutes  
5       that require any special interpretation by a federal court.

6           I don't remember much from law school, your Honor,  
7       but one of the things that I do remember some 30 years ago is  
8       that subject matter jurisdiction in a case can't be waived  
9       and so it doesn't matter, your Honor, whether we're happy to  
10      be in this courtroom, we are, whether the defendants are  
11      happy to be here, or whether your Honor is happy to have us.  
12      If we remain in this courtroom and we take this case all the  
13      way through trial, through a verdict and to a final judgment,  
14      we'll be taking it all the way to a final judgment that may  
15      not be enforceable at the end of the day.

16           THE COURT: Okay. Let's cut to the chase. All  
17      right. Grable is the 800-pound gorilla which hovers over  
18      this case and what is its applicability to the facts of this  
19      case? From your point of view, obviously your position is  
20      Grable is a wonderful case and it doesn't apply here. Tell  
21      me why.

22           MR. KASOWITZ: Actually, we think that Grable is a  
23      wonderful case, it is a good gorilla for us, your Honor, and  
24      we think that it applies very directly in two basic ways.

25           First, if you look at the facts of Grable, what the

1 court said there was that there was one issue and only one  
2 issue for resolution and the issue for resolution in that  
3 case was federal. The question of whether or not there would  
4 be -- whether or not under the Federal Tax Code a notice to a  
5 debtor taxpayer was sufficient be of the seizure of his  
6 property at a foreclosure sale. So, it was only one issue.  
7 It dealt with federal law and the court held in that  
8 circumstance that in that kind of exceptional circumstance,  
9 that would require the intervention of the federal court.

10 Our case is completely different. We have numerous  
11 different issues and numerous issues of state law and  
12 numerous issues of state law predicates which govern here.  
13 And under the three-prong test in Grable, clearly under the  
14 three-prong test in Grable, your Honor, the defendants  
15 clearly cannot sustain the heavy burden that they have of  
16 demonstrating that there's federal question jurisdiction.

17 The first prong is really the most important prong  
18 and that is the question of whether or not the state law  
19 claims necessarily raise a federal issue, and the way that  
20 the courts have interpreted that prong is, is it possible for  
21 the case to be resolved without applying federal law, and  
22 it's very clear here, your Honor, that it's not only possible  
23 but it is the fact that this case can be resolved without any  
24 reference to federal law.

25 The complaint contains numerous allegations of

1 predicate acts of racketeering activity under the New York  
2 state -- under the New Jersey RICO statute which have nothing  
3 at all to do with federal law.

4           The complaint alleges, for example, that the  
5 defendant securities analysts, including Gradient Analytics  
6 and including David Maris of Banc of America, were paid to  
7 issue false and misleading analysts' reports about Biovail at  
8 the behest of the hedge funds, including S.A.C. Capital, and  
9 that misconduct and those allegations clearly constitute  
10 violations of numerous provisions of New Jersey law which are  
11 incorporated as predicate acts in the RICO statute Chapter  
12 41-1.

13           Chapter 41-1A provides that racketeering activity  
14 includes in Subsection O, fraudulent practices and all crimes  
15 defined in Chapter 21 of Title 2C. Chapter 21 of Title 2C  
16 includes the crimes of commercial bribery and deceptive  
17 business practices. But the conduct of the defendants that  
18 we've alleged here, your Honor, clearly qualifies as  
19 fraudulent practices, clearly qualifies as deceptive business  
20 practices, and clearly qualifies as commercial bribery.

21           Now, there's another predicate act here that's  
22 important and that's the predicate act in Chapter 41-1  
23 Subsection P, and that's fraud in the offering, sale or  
24 purchase of securities. And the complaint clearly alleges  
25 that the hedge fund defendants, again including S.A.C.

1 Capital, engaged in the trading of securities in connection  
2 with the issuance of these fraudulent analysts' reports which  
3 I've described.

4 So, even if the Court were to ignore entirely all of  
5 the federal predicate acts that are included within the  
6 complaint, each of the state law RICO causes of action is  
7 more than amply supported by the state law predicates in the  
8 area of racketeering that we've alleged.

9 So, in that circumstance, your Honor, under Grable  
10 the remand motion for that reason alone should be granted  
11 because the defendants just cannot sustain their burden of  
12 demonstrating that a resolution of federal issues is  
13 necessary to these claims. And even if they could sustain  
14 that burden, your Honor, even if they could show, which they  
15 can't, that there's somehow -- the federal court's attention  
16 here is necessary for the resolution of their claims, they  
17 also fail the second prong of the Grable test.

18 The second prong of the Grable test is that it asks  
19 whether the federal question that is raised is actually  
20 disputed and substantial, and what that means, your Honor, is  
21 that you need something more than just a straightforward  
22 application of federal law. The cases are very, very clear,  
23 including the recent cases in this court, that in order to be  
24 substantial, what is required is an interpretation of a  
25 provision of federal law that is ambiguous and unsettled.



1           Now, that's definitely not the case here, your  
2   Honor. The fact is that the federal predicate acts that  
3   we've alleged in the complaint are garden variety, wire, mail  
4   fraud and securities fraud claims, and there's absolutely  
5   nothing ambiguous or unsettled about them.

6           For mail fraud you need two things. You need a  
7   fraud, you need a mailing. For wire fraud you need two  
8   things. You need a fraud, you need a use of the wires. And  
9   for securities fraud you need fraud in connection with a  
10   purchase or sale of a security.

11           Now, there's no question but that all of these  
12   predicate acts are easily satisfied under well-settled law.  
13   There's nothing complicated, there's nothing ambiguous,  
14   there's nothing esoteric that needs to be decided here that  
15   would require the intervention of the federal court.

16           THE COURT: They've argued that there are all sorts  
17   of unsettled issues like, for example, whether or not loss  
18   causation standards required under federal securities law  
19   have been met, whether or not you have standing under the  
20   RICO statute to pursue the claims.

21           MR. KASOWITZ: Your Honor, I think, I really think  
22   that those are red herrings. I think the way it works is as  
23   follows: They have argued that when looking at the wire and  
24   mail fraud statutes and the securities statutes, whether or  
25   not all of the issues that are at play in the federal courts

1 as to whether or not you need materiality reliance and the  
2 like are going to be issues here, but the fact of the matter,  
3 your Honor, is that those are issues under the federal RICO  
4 statute that's being litigated in the federal courts and in  
5 the federal courts you don't permit securities predicate acts  
6 to be appended as predicate acts by the PSLRA. Okay.

7 Here, we're in or should be in state court and the  
8 question of whether or not materiality, loss causation or any  
9 of those issues is going to be engrafted upon the wire and  
10 mail fraud statutes is going to be a question for the state  
11 court in interpreting the state RICO statute. That's very,  
12 very clear.

13 And in fact, your Honor, were we in the situation  
14 where we were in front of your Honor in this case and the  
15 question came up as to whether or not you would engraft the  
16 materiality or a loss causation requirement onto the federal  
17 RICO predicate here, what your Honor would say, we submit, is  
18 this is not for me to decide under federal law. I've got to  
19 determine what the Supreme Court of New Jersey would say  
20 about this issue because it's an issue of state law under the  
21 New Jersey RICO statute.

22 THE COURT: And their argument would be that New  
23 Jersey has already said that we follow the federal RICO  
24 statute and, therefore, I'd be interpreting the federal  
25 RICO statute.

1           MR. KASOWITZ: But the fact of the matter is, your  
2 Honor, that New Jersey doesn't follow the federal RICO  
3 statute, clearly doesn't. The basis for that is in the  
4 specifications of predicate acts under 41-1, and when you  
5 look at those specifications, the reference to the federal  
6 RICO statute is very clear. It just says in the definitional  
7 sections conduct for predicate acts will be defined, will be  
8 defined, including conduct that may be at issue in the  
9 federal RICO statutes. So, it's not saying that it  
10 follows -- there's no law that it follows to the tee and, in  
11 fact, the legislatures are very, very clear here, and this  
12 really implicates the third prong of the case, of Grable.  
13 The legislatures are very, very clear.

14           What the federal -- what Congress has said is that  
15 you're not going -- under the PSLRA, is that you're not  
16 permitted to have securities acts as predicate acts for the  
17 federal RICO statute, very, very clear. What the New Jersey  
18 legislature has said is that you can have securities acts as  
19 predicate acts for the New Jersey state RICO statute. So,  
20 there's a very clear division.

21           Following the logic of the defendants here, what  
22 they seek to do is to reverse that in effect. According to  
23 their argument, according to their argument, in effect,  
24 according to their argument, every single time that a  
25 plaintiff alleged a securities act as a predicate act in a

1 state RICO case, they would claim that there would be a right  
2 and an entitlement to remove that case to federal court where  
3 under the PSLRA the case would be dismissed. So, in effect,  
4 what they're seeking to do is the work that Congress, the  
5 federal Congress has already done or they're seeking to undo  
6 it, because Congress, in adopting the PSLRA and in  
7 prohibiting securities acts as being predicate acts under the  
8 federal RICO statute, could have said that we will preempt  
9 state law, we will not permit the New Jersey legislature to  
10 adopt a statutory framework that permits a securities  
11 violation to be a predicate act. But it didn't.

12 According to their thinking, every time a securities  
13 violation, a securities crime is a predicate act in a state  
14 RICO case, that will be a basis for removal to the federal  
15 court where the case will be dismissed. So, what we find  
16 ourselves here, your Honor, is a situation where under this  
17 logic Biovail might have no recovery and no possibility for  
18 recovery whatsoever if this case were removed.

19 THE COURT: Well, of course, your argument would be  
20 that I've got all sorts of other state predicates which don't  
21 implicate that particular issue under any circumstances.

22 MR. KASOWITZ: Absolutely true, your Honor. And  
23 that's the reason -- that was my first point, and that's the  
24 reason that the first prong of Grable cannot be satisfied by  
25 the defendants here.

1           THE COURT: I'm just curious, I know you'd love to  
2 be here but you'd also love to be in state court. You could  
3 have made this removal-proof by not pleading any federal  
4 statutes at all as predicates. Correct?

5           MR. KASOWITZ: I suppose -- first of all, I would  
6 love to be here, your Honor. I have been in front of your  
7 Honor in the past and I'd like to be back here, but I'm  
8 afraid that I can't because there's no subject matter  
9 jurisdiction here.

10           I suppose you're right, your Honor, we could have  
11 not pled any of the federal predicate acts that we did plead  
12 in the complaint, but the fact of the matter is, your Honor,  
13 we weren't being cute when we pled that complaint. This is a  
14 well-pleaded complaint and we pled all of the violations of  
15 the applicable laws that we found and that were present and,  
16 in fact, we were permitted to do that under the state RICO  
17 statute which expressly says that you can do that, federal or  
18 state, but having pled all of those, having pled all of those  
19 predicate acts, by no means is that a basis for the removal  
20 of this case -- well, by no means is that a basis for federal  
21 question jurisdiction here and if you look at virtually every  
22 single case in the country, including cases in this court  
23 which have addressed that issue, which have addressed the  
24 issue of a state law RICO claims with predicate acts that are  
25 either federal or state, every single case has granted a

1 motion to remand, every single one. The only one that didn't  
2 was the Ayres case in the 11th Circuit.

3 THE COURT: I was just about to ask you about Ayres.

4 MR. KASOWITZ: I really would like to be here, your  
5 Honor. And in Ayres the court, the 11th Circuit itself was  
6 very, very clear to say that it was a very, very limited  
7 situation, and cases construing Ayres have all taken the  
8 position that it was a very, very limited situation.

9 THE COURT: Do you think the court was essentially  
10 saying there, well, it's close but since we've already gone  
11 through dispositive motion practice on this and decided the  
12 merits of all the issues, let's stretch a point and keep  
13 jurisdiction.

14 MR. KASOWITZ: Well, I'm not sure if they were or  
15 not, your Honor, but it was kind of an odd situation because  
16 the predicate acts that were pled were federal mail and wire  
17 fraud predicate acts. But to resolve the question as to  
18 whether or not the elements of those crimes could be  
19 satisfied, what the court said it needed to do was to look at  
20 this, I think it's a national -- the Federal Motor Vehicle  
21 and Safety Act, and to determine whether or not the  
22 defendants in that case, the defendant was General Motors,  
23 and it needed to make a determination as to whether General  
24 Motors had an affirmative obligation to make disclosures  
25 about product defects in its cars. I think the defects were

1 with Delco parts or something like that, and if it found that  
2 General Motors had that affirmative obligation to make that  
3 disclosure, then all of the mailings in the marketing  
4 literature and the like that General Motors had sent out  
5 about the safety of its cars potentially could be -- could  
6 have been violative of the wire and mail fraud statutes. So,  
7 it's a complicated situation. It's not nearly what we have  
8 here. And there have been courts that have looked precisely  
9 at that set of facts.

10 There's the Bridgestone case which came three years  
11 later. I think that Ayres was in 2000, Bridgestone was in  
12 2002 or 2003. It was a federal district court in Indiana and  
13 they were dealing with exactly the same kind of situation,  
14 the same act, but the result that Bridgestone came to was  
15 exactly the opposite. They granted the motion -- the federal  
16 court there granted the motion to remand and the reason that  
17 it granted the motion to remand was it said we don't need to  
18 get to this issue of federal mail or wire fraud predicate  
19 acts. All we need to do is to look at other state predicate  
20 acts like a manslaughter predicate act and the like and it's  
21 not necessary for us to look to federal law.

22 And that situation is exactly the situation we have  
23 or very close to the situation we have in this very case  
24 where we have state law predicate acts which the court can  
25 look to. It doesn't need to resolve the issue by reference

1 to federal law, so, therefore, the defendants can't sustain  
2 their burden to show why they should remain in federal court  
3 and it should be remanded.

4 THE COURT: Okay. Tell me about SLUSA. Their  
5 argument, as I understand it, is that for practical purposes  
6 your corporation should be treated as if it was a class  
7 because you are trying -- I guess the argument is you're  
8 trying to get all the damages that a class would get because  
9 you want the entire market capitalization that was lost. So,  
10 it's a functional equivalent of representing a class of  
11 shareholders in Biovail.

12 MR. KASOWITZ: I will say this as politely as I can.  
13 They're wrong at every single count. First of all, we are  
14 not -- the case that we brought is not a class action. It is  
15 brought on behalf of the two plaintiff corporations for their  
16 own benefit seeking damages for themselves and the damages --  
17 this is the key point, I think the argument that the  
18 defendants are making really is this. They're saying we've  
19 read your complaint and from our reading of your complaint,  
20 we are going to contend that you are looking not only for  
21 damage to the company but you are looking to recover loss for  
22 the decline in the value of the shares, and because you're  
23 looking to recover for the loss in the decline of the value  
24 of the shares as a result of this conspiracy, that's the only  
25 kind of -- the only entity that can seek to recover that loss



1 are shareholders. So, you must in effect be representing the  
2 interests or trying to represent the interests of the  
3 shareholders and those shareholders are going to comprise a  
4 class and, so, therefore, you're bringing this on behalf of a  
5 class and SLUSA says that you've got to be in federal court.

6 Well, all those things are wrong. First of all,  
7 what we are looking to recover is damage to the corporation  
8 from this illegal conspiracy, and there's been substantial  
9 damage to the corporation from this conspiracy. The  
10 conspiracy goes back, the allegations in the complaint go  
11 back to the spring, summer of 2003, and what was happening at  
12 that time was Biovail was seeking to transform itself from  
13 being a manufacturer, sort of a boutique manufacturer of  
14 pharmaceuticals to becoming a vertically integrated full  
15 service manufacturer. They were going to develop the  
16 pharmaceuticals, they were going to manufacture the  
17 pharmaceuticals, they were going to market them and they were  
18 going to distribute them.

19 And so, in the roll-out of this thing, one of the  
20 key elements of it was they were going to join up with a  
21 joint venture partner, a large distribution company here in  
22 New Jersey, and they were going to become a fully integrated  
23 manufacturer.

24 Well, the attack by the defendants began just at or  
25 about that time and this attack which consisted of a massive

1   disinformation campaign aimed at the business press, aimed at  
2   the -- from the analysts and the like, and also the  
3   instigation of improper federal and state regulatory probes,  
4   had a disastrous effect on the company.

5           One of the things that happened was the joint  
6   venture partner pulled out. The other thing that happened  
7   was the doctors who were going to prescribe Biovail's  
8   medications and the like, they pulled out. And the third  
9   thing that happened among others was that the banks pulled  
10   out. So, the financing that was going to be critically  
11   important for the roll-out of this new venture and the new  
12   venture was going to be critically important to the future  
13   and success of the company was destroyed and there are  
14   massive damages that resulted from that. All of the damages  
15   that were incurred by the company in that roll-out and what  
16   the company would have been had that roll-out been permitted  
17   to have survived and to have prospered, all are damages that  
18   the company has.

19           So, the third piece really is this, your Honor.  
20   Under SLUSA itself, you only need to look at the terms of  
21   SLUSA itself to see that we are not a class action because  
22   SLUSA says that it defines a corporation as one person. It  
23   doesn't define a corporation in any way, that's what we are,  
24   as a representative body or seeking to represent the  
25   interests of the shareholders and the like. I think your

1 Honor that that's a make-weight argument. I don't think that  
2 it has any merit whatsoever.

3 THE COURT: Thank you. Let me hear from Mr. Kramer.

4 MR. KRAMER: Yes, your Honor.

5 THE COURT: Okay. We've got the Grable three-part  
6 test. Tell me how you meet it.

7 MR. KASOWITZ: Absolutely, your Honor. Let's focus  
8 on Grable. Grable is the relevant binding Supreme Court  
9 decision and what Grable says at page 2368 is that the  
10 relevant question is, quote, does a state law claim  
11 necessarily raise a stated federal issue actually disputed  
12 and substantial --

13 THE COURT: Keep going.

14 MR. KRAMER: -- which a federal forum may entertain  
15 without disturbing any congressionally approved balance of  
16 federal and state judicial responsibilities. And I think the  
17 confusion here is they have confused the issue of whether  
  
18 their complaint necessarily raises a substantial federal  
19 issue with whether it raises a necessarily dispositive issue.  
20 Those are two different concepts and what Grable said is it  
21 must necessarily raise it.

22 And plaintiffs are the masters of their complaint.  
23 They decided to inject federal predicates into their claim  
24 and because they injected those federal predicates, your  
25 Honor, this Court or any court that deals with this case will

1 necessarily have to deal with the federal issues.

2           Now, we can talk in a minute why we believe those  
3 federal issues are substantial but there's no getting away  
4 from the fact that their complaint necessarily raises the  
5 issues because they've injected the federal predicates. It's  
6 not that you have to look behind the complaint for a lurking  
7 federal issue. They actually put it in the complaint by  
8 alleging violations of federal mail fraud, wire fraud and  
9 securities fraud as predicate acts.

10           And by the way, your Honor, we don't know today  
11 whether some of those federal issues will be dispositive or  
12 not. I don't think dispositiveness is the test. It's not  
13 the language of Grable which says necessarily raised.

14           But who knows after motion practice, on motion to  
15 dismiss or summary judgment, it may be that the only issues  
16 in this case are federal ones and if this case were to go to  
17 a jury, we don't know whether the jury would focus only on  
18 the federal issues. So, they may turn out to be dispositive  
19 here, but that's not the test, that's not the language of  
20 Grable, and plaintiffs could have avoided this situation on  
21 1441. They had the ability -- they don't have to raise every  
22 claim they think they possibly have. They have the ability  
23 to restrict their claims and try to avoid federal court but  
24 they injected the federal claims and there's a consequence to  
25 that. And one of the consequences is it, therefore,

1 satisfies the Grable standard of necessarily raising the  
2 federal issues.

3 THE COURT: Let me ask you a question.

4 MR. KRAMER: Okay.

5 THE COURT: In making that argument which  
6 essentially is that the inclusion of federal predicates  
7 necessarily raises at least a federal question regardless of  
8 whether or not substantial or not --

9 MR. KRAMER: Correct.

10 THE COURT: -- are you suggesting to me that Grable  
11 has rejected the language in Christianson vs. Colt Industries  
12 which suggests that where there are federal issues but there  
13 are also independent state claims or issues which could be a  
14 basis for granting the state cause of action, that the claim  
15 does not arise under federal law?

16 MR. KRAMER: Well, I think that Christianson, of  
17 course, is not a removal case. It's not a case under 1441  
18 and it's not a RICO case and, so, while Christianson has some  
19 interesting language in it, that involved whether a claim  
20 arose under patent law for the purpose of determining whether  
21 an appeal belonged in the Federal Circuit or in the Seventh  
22 Circuit, so, I would say that Christianson, while  
23 interesting, is not directly on point because it doesn't  
24 construe 1441. It construes similar language in another  
25 statute which might be of interest to us but it is not

1 directly on point here, your Honor. And I think that Grable  
2 is the Supreme Court's most recent enunciation of the test,  
3 and when you look at Grable, when you look at Grable, the  
4 issue that the Supreme Court took cert on in Grable, the  
5 issue that the Supreme Court thought was significant enough  
6 to decide was the question of whether Merrell Dow was being  
7 correctly read by a variety of courts, including Horowitz in  
8 this district, to require that the federal issues be issues  
9 that the plaintiffs could have pursued in federal court,  
10 where they had -- they could have pursued a cause of action.  
11 And many cases were knocked out of federal court on the  
12 grounds that if the plaintiff couldn't pursue the claim,  
13 didn't have a private right of action, it didn't belong in  
14 federal court.

15           What Grable holds is that's an incorrect  
16 interpretation of federal law and, in fact, even if the  
17 plaintiff could not have filed the suit in federal court in  
18 the first place and could not have pursued the claim in their  
19 own right, you still can have removal if the federal issue is  
20 significant enough. And I think that's important, your  
21 Honor, when we look at Grable because I think what Grable is  
22 saying is if it raises a federal issue, if it necessarily  
23 raises a federal issue, we're going to determine whether it's  
24 significant and if it is significant, there is arising under  
25 jurisdiction in federal court and to the extent that has any

1   tension with Christianson which I think is not on point, I do  
2   think that Grable is the Supreme Court's most recent  
3   enunciation of their view of arising under jurisdiction under  
4   1441, and so it should be filed.

5               THE COURT: The Fifth Circuit has adopted the  
6   Christianson analysis at least in a removal situation in the  
7   Howery vs. Allstate case.

8               MR. KRAMER: Yes, your Honor. Not in a RICO case,  
9   not in a RICO case. But there are two courts which have done  
10   it, but in those cases, your Honor, I would note a couple of  
11   things.

12              First of all, Howery is a 2001 case, Grable is a  
13   2006 case, so, again, it's before the Supreme Court said we  
14   don't really care, you know, what we're really focusing on is  
15   the way I read Grable, what we're really focusing on is, is  
16   there a significant issue. There's no Third Circuit court  
17   that has ever followed this notion, and what Howery says at  
18   page 917 is what they were looking for was a pragmatic  
19   assessment of the nature of the federal interest at stake.  
20   And one way to read Howery, I believe, is that the court  
21   decided that the federal interests there involved a case  
22   where the plaintiff's house burned down and the plaintiff  
23   tried to get insurance and the insurer said no, no, no, we  
24   think, you know, this is an issue of arson and, therefore,  
25   we're not going to honor your claim.

1           The plaintiff sued and the defendant said, well,  
2   there's an issue of whether proper notices were given under  
3   this policy, it's kind of a federal issue, let's move it to  
4   federal court. And Howery said this case doesn't belong in  
5   federal court, the federal right isn't strong enough,  
6   insurance historically is an issue left to the states.

7           The case we have here with Biovail is dramatically,  
8   dramatically different. It's post Grable. It involves an  
9   allegation, the principal allegation by plaintiffs that the  
10   defendants manipulated the market for Biovail stock through  
11   an alleged disinformation campaign and profited through short  
12   selling.

13          Your Honor, these issues of market regulation and  
14   short selling are quintessentially federal issues. They're  
15   wholly regulated by the federal government. It's not like  
16   the insurance industry that is a state regulated claim.  
17   These are issues that have been the subject of Congressional  
18   acts over the past ten years from the PSLRA all the way  
19   through SLUSA. It's been the subject of numerous Supreme  
20   Court decisions from Central Bank all the way through Dura  
21   and Dabit. The issues that we've identified for your Honor,  
22   the courts themselves say these are significant issues.

23          THE COURT: Okay. Let's take a look at those. All  
24   right. So we're going now to substantial federal question  
25   issues.



1 MR. KRAMER: That's fine.

2 THE COURT: Let's take a look at the substantial  
3 federal issues which you've asserted.

4 MR. KASOWITZ: Your Honor, you'll agree with me  
5 based on plaintiff's presentation there's certainly dispute.  
6 That much we can agree upon. So, I think the issue is only  
7 whether they're substantial, and I can walk through them.

8 The first one is whether this decline in market cap  
9 that is one of the allegations of damage in this case is  
10 really a proxy for shareholder loss. And your Honor, if I  
11 can just grab the complaint for a second, I know that the  
12 plaintiffs wish they hadn't alleged this in their complaint  
13 but to paraphrase I guess a former secretary of defense, you  
14 go to federal court with the complaint you have, not the  
15 complaint you wish you had. And in this complaint, your  
16 Honor, at least twice at paragraph 173, they seek damages for  
17 lost market capitalization and, again, in paragraph eight at  
18 179, they seek damages for lost market cap, and that's not a  
19 proxy for anything.

20 The market capitalization of a company is the stock  
21 price times the number of shares. It is exactly what  
22 shareholders seek, lost market cap, when they bring a  
23 shareholder class action.

24 THE COURT: Let's forget the SLUSA issue for the  
25 time being and let's deal with whether or not that presents a

1 substantial issue, an essential and substantial contested  
2 federal issue. Okay.

3 MR. KRAMER: We'll put SLUSA aside for a minute and  
4 I'll get to the non-SLUSA issues then.

5 THE COURT: Let's get to the non-SLUSA issues.

6 MR. KRAMER: This complaint does not allege that  
7 Biovail relied on the misrepresentations or was a buyer and  
8 seller of the stock or that the disclosure of the alleged  
9 fraud led to a decline in their stock price, all elements of  
10 a 10(b) federal security claim.

11 They have raised as a predicate act to their RICO  
12 claim federal securities law and now their argument to the  
13 Court is, yes, we raise it as a predicate act but, no, we're  
14 not going to have to prove it and, no, the court is not going  
15 to have to address it, and your Honor, I don't think that's  
16 right. There's no case they've cited, there's no case  
17 they've cited, we cited several cases, there's no case they  
18 cited where courts said you can plead in state court a  
19 federal predicate but you don't have to prove the elements of  
20 that predicate.

21 The one case that they cite, an SEC case, the court  
22 holds the SEC, in order to get recovery, need not prove  
23 reliance. That's a special rule for the SEC. That's not a  
24 rule for plaintiffs with federal predicates in state court.

25 THE COURT: Let me ask you a question. Why is that

1 a federal question as opposed to a state law question and, in  
2 particular, okay, the plaintiffs in this case are not seeking  
3 a direct recovery under federal securities law. Therefore,  
4 for example, the Supreme Court's recent announcements on loss  
5 causation issues which of course are extremely relevant to  
6 potential recovery by a securities class seeking a recovery  
7 directly under Rule 10(b)(5) may not be in the least bit  
8 relevant to whether or not there has been a violation of the  
9 rule as a predicate. In short, a criminal violation of  
10 10(b)(5) in effect without implicating whether or not the  
  
11 standards for federal recovery of damages under 10(b)(5) have  
12 been met, why can't that be the case here?

13 MR. KRAMER: Your Honor, I think I follow your  
14 question and if not, I'll ask for a clarification. I think  
15 the reason --

16 THE COURT: I'll tell you what. Let me make it  
17 clearer. All right. We'll move off of 10(b)(5) perhaps to a  
18 clearer issue.

19 MR. KRAMER: All right.

20 THE COURT: Mail fraud.

21 MR. KRAMER: Okay.

22 THE COURT: Okay. The criminal provisions of the  
23 federal mail and wire fraud statutes require simply that a  
24 defendant have engaged in an artifice or scheme -- artifice,  
25 device or scheme to defraud and utilize the mails in

1 furtherance of that scheme. Correct?

2 MR. KRAMER: Your Honor.

3 THE COURT: That's the gist of the statute.

4 MR. KRAMER: Yes. Your Honor, Anza, a recent  
5 Supreme Court case, states that there's an open and  
6 significant question of whether reliance is an element.

7 That's what Anza in the Supreme Court states. I believe  
8 that's an open significant federal issue regarding the mail  
9 and wire fraud statutes.

10 THE COURT: Okay. Now, there has been a decision  
11 which says that -- when you say reliance, reliance for what  
12 purpose?

13 MR. KRAMER: Well, there's no reliance alleged here  
14 at all.

15 THE COURT: Okay.

16 MR. KRAMER: So for the purpose of this complaint,  
17 it's simply not pled, it's simply not there, and we could  
18 argue whether it's required or not and I concede, your Honor,  
19 Anza leaves the question open. Anza says we're not going to  
20 address this issue because we can resolve the case on other  
21 bases, but Anza does say that it's a significant and open  
22 issue whether reliance has to be pled, and there's no  
23 reliance of any sort pled anywhere in this very lengthy  
24 complaint.

25 THE COURT: Refresh my recollection, though.

1 MR. KRAMER: Okay.

2 THE COURT: Anza is a Supreme Court case dealing  
3 with the use of mail fraud predicates for a federal RICO  
4 claim.

5 MR. KRAMER: That's correct, your Honor.

6 THE COURT: Okay. Now, therefore, even the effect  
7 of Anza is at this point an issue for the Supreme Court's  
8 evaluation of the sufficiency of pleading and proofs for  
9 federal RICO claims. Correct?

10 MR. KRAMER: I don't believe that's correct and I'll  
11 tell you why.

12 THE COURT: Why?

13 MR. KRAMER: And I'll tell you why I don't believe  
14 that's correct. I believe that when you plead a federal  
15 violation as a predicate act in a state RICO case, you're  
16 obligated to, if you're going to prevail on that part of your  
17 case, to plead and prove the elements of the predicate you've  
18 alleged. And so, here having alleged -- now, there are other  
19 ways they vsn plead their claim, there's no question about  
20 that. But if they're going to plead their claim through the  
21 wire fraud predicate, the federal wire fraud predicate which  
22 they've alleged, we're going to have a fight, we're going to  
23 have a disagreement, and we're going to have a disagreement  
24 over whether one of the elements they have to plead and prove  
25 to establish that predicate on the way to establishing the

1 RICO claim is reliance.

2 THE COURT: Let me ask you this, though.

3 MR. KRAMER: Okay.

4 THE COURT: Anza is a decision of the Supreme Court  
5 in the context of a RICO claim predicated upon mail fraud.

6 MR. KRAMER: Correct.

7 THE COURT: Question, did it purport to be leaving  
8 as an open issue whether or not a criminal prosecution for  
9 mail fraud requires detrimental reliance?

10 MR. KRAMER: Your Honor, I don't know the answer to  
11 that.

12 THE COURT: Okay. The reason I ask you that is, I  
13 mean, to the best of my recollection, I don't recall  
14 detrimental reliance being an element of criminal RICO  
15 prosecutions. It requires, at least my recollection is in  
16 the context of criminal prosecutions, a demonstration that  
17 there was a scheme or artifice to defraud. Among other  
18 things, for example, success or failure has never been a  
19 component of criminal prosecutions under criminal RICO  
20 statutes. Okay. And if you failed, for example, then one  
21 would presume that there's no detrimental reliance if your  
22 scheme or artifice to defraud were a failure.

23 What I'm suggesting to you is that a state's  
24 incorporation of a federal standard of conduct into a state  
25 statute may very well incorporate issues as to the state